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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 990

JOSEPHINE V. HALL,

Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

ROBERT ASH,
Counsel for Petitioner.

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Petition.

The above named taxpayer by her counsel, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case February 2, 1942 (R. 17).

Jurisdiction.

The judgment of the Court of Claims was entered February 2, 1942 (R. 17). The jurisdiction of this Court is found in section 240 of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Two questions were presented to the Court of Claims. Certiorari is sought only on the second question which is:

Is the principle of recoupment, as applied in *Bull* v. *United States,* 295 U. S. 247, applicable under the circumstances of the case at bar?

Or, expressed in another manner, should the Commissioner of Internal Revenue in assessing and collecting income taxes from the petitioner for the years 1933 to 1935, inclusive, have reduced those taxes by way of recoupment and by an offset and credit in the amount of petitioners overpayment of income tax for prior years and, whether or not he should have done so, should the Court of Claims have done so?

Statement.

The facts which are fully and fairly found by the Court of Claims (R. 5-10), are summarized as follows:

The petitioner, Josephine V. Hall, was one of the life beneficiaries of a testamentary trust created by her father, who died February 10, 1910. The corpus of the trust consisted primarily of two leaseholds at 634 and 636 Fifth Avenue, New York City. The terms of both leases expired May 1, 1938.

Under the trust, as construed by the courts of New York, the life beneficiaries, including the petitioner, were entitled to the entire net income of the trust and the trustees were not required or permitted to set up a fund out of income for depreciation or amortization.

Prior to 1929, the Commissioner of Internal Revenue did not allow the beneficiaries (including petitioner) to deduct from income received any allowance for exhaustion, wear, tear, obsolescence, amortization or depreciation, nor

did he allow the trustees any like deduction because they had not actually withheld any income and had not set up any reserve.

June 8, 1932, the trustees sold the leaseholds for $1,017,750.00, payable in equal monthly installments over a period of sixty-nine months, ending April 16, 1938.

Under the power and authority vested in the trustees under the will of Thomas A. R. Hall, the proceeds from the sale of the leaseholds were paid direct to the beneficiaries, each receiving one-third.

In computing the gain on the said sale, the Commissioner of Internal Revenue reduced the basis for computing gain or loss by depreciation on the building and amortization of the leases from March 1, 1913, to the date of the sale, although he had refused to allow such a deduction from either the income of the trustees, or the beneficiaries, prior to 1929.

As a result of the said action of the Commissioner of Internal Revenue, the petitioner was compelled to pay additional income tax and interest thereon for the years 1932, 1933, 1934 and 1935 in the respective amounts of $1,918.19, $10,032.40, $68.60 and $903.37.

Petitioner filed timely claims for the refund of the amounts stated in the preceding paragraph on the grounds:

(1) As a deduction for depreciation and amortization had not been allowed to the trustees, nor to the petitioner, prior to 1929, the basis for computing gain on the sale should not be reduced by such allowances.

(2) Petitioner was entitled to recoupment for 1932, 1933, 1934 and 1935 because depreciation and amortization allowances for the years prior to 1929 had been used to reduce the basis in computing gain on the sale, although no de-

ductions therefore had been allowed in computing income for the years prior to 1929.

The Court of Claims held against the petitioner on both issues (R. 11-17). Certiorari is sought limited to the second, or recoupment issue.

Statutes Involved.

The applicable portions of the relevant statutes are set forth in the appendix, *infra*, p. 10.

Specification of Errors.

The Court of Claims erred:

1. In holding that the principle of recoupment as applied in *Bull* v. *United States*, 295 U. S. 247 does not apply in this case.

2. In holding that the income taxes overpaid by the petitioner, as a result of the action of the Commissioner of Internal Revenue, for years prior to 1929 should not be offset or credited against petitioner's income taxes for the years 1932 to 1935, inclusive.

3. In holding that the petitioner is not entitled to recover.

Reasons for Granting the Writ.

This petition is sought to resolve the conflict between the Court of Claims and Circuit Courts of Appeal, as will hereinafter be particularly pointed out, on the important and at present confused, question of whether *Bull* v. *United States*, 295 U. S. 247, has been overruled or nullified by *McEachern* v. *Rose*, 302 U. S. 56. Or, stated otherwise, whether equitable principles are to be considered in determining Federal tax liabilities.

In the *Bull* case partnership earnings accruing after Bull's death were subjected to estate tax. Later the Com-

missioner of Internal Revenue determined the said earnings represented income to the estate and collected a deficiency in income tax after the refund of the estate tax was outlawed. Suit was filed in the Court of Claims but was dismissed, 79 Ct. Cls. 133, 6 F. Supp. 141, as was the case at bar, on the ground that the action was barred by limitations. This Court reversed on the theory of recoupment because retention of the money would be "immoral and amounts in law to a fraud on the taxpayers rights."

In the *McEachern* case, the taxpayer made an installment sale of stock in 1924, and elected to return the profit on the installment basis over a ten year period. After his death in 1928 his administrator filed returns for 1928 to 1931, inclusive, which erroneously showed a sale of a part of the stock in each of the said years, whereas he should have reported, as income for 1928, the capital gain included in the value of the unpaid installments at the time of the taxpayer's death. After limitations expired for assessing additional taxes for 1928, the administrator sued for refunds for 1929 to 1931, inclusive. This Court allowed recovery and did not permit the outlawed 1928 tax to be offset against the 1929 to 1931 refunds. A distinguishing feature of the *McEachern* case is that the taxpayer had elected to return the transaction on the installment basis. The Commissioner was thus put on notice of the true facts, so no element of estoppel existed.

In the case at bar the Court of Claims thought the *McEachern* case rather than the *Bull* case controls.

I.

The decision of the Court of Claims is in conflict with decisions of this Court. The recoupment principle, as applied in Federal tax cases, is similar to the old doctrine of unjust enrichment, an equitable doctrine of general application available as a defense to an action where to allow re-

covery would result in unjustified enrichment of the plaintiff. *Meyers* v. *Hurley Motor Co.*, 273 U. S. 18.

The application of recoupment in Federal tax cases was first announced by this Court in *Bull* v. *United States*, 495 U. S. 247 and *Stone* v. *White*, 301 U. S. 532, indicates that its application in such cases is fully accepted.

It is stated in *Stone* v. *White* (p. 534).

> "The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its function. It is the lineal successor of the common Count in indebitatus assumpsit for money had and received * * *."
>
> "Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles * * * have long been recognized in this Court * * *. It is an appropriate remedy for the recovery of taxes erroneously collected, * * *"

At page 539 the court, in speaking of recoupment, states:

> "Such a defense is never barred by the statute of limitations so long as the main action itself is timely". *Bull* v. *United States* 295 U. S. 247; *Williams* v. *Neely* (C. C. A. 8th), 134 F. 1, 13. Compare *United States* v. *Macdaniel*, 7 Pet. 1, 16; *United States* v. *Ringgold*, 8 Pet. 150, 163, 164, where equitable recoupment against a claim by the government was allowed notwithstanding the immunity of the government from suit".

II.

The decision of the Court of Claims is in direct conflict with the *Dixie Margarine Co.* v. *Commissioner*, 115 F. (2d) 445, wherein the Sixth Circuit, on the authority of the *Bull* case, permitted recovery under the following facts: The Commissioner of Internal Revenue claimed a deficiency in income tax for 1932 as a result of refunds

of oleomargarine taxes illegally collected for 1925 to 1931. Similar oleomargarine taxes had also been collected for 1923 to 1925 but the recovery thereof was barred by limitation. The amount of the barred refunds exceeded the proposed deficiency. The Court held that the barred refunds of oleomargarine tax could be recouped and used as an offset against the 1932 deficiency in income tax because both taxes had a common origin.

Obviously the taxes involved in the *Dixie Margarine* case did not involve the identical sum of money or grow out of the same transaction, which was reason given by the Court of Claims for not applying the rule of the *Bull* case in the case at bar. In fact, in the *Dixie Margarine* case, an oleomargarine tax was allowed as a recoupment against an income tax, an altogether different type of tax. In the case at bar only income taxes are involved and for all years grow out of the identical adjustments to income on the identical properties. The conflict is direct and irreconcilable.

III.

The decision of the Court of Claims is in conflict with the Seventh Circuit in *Lofquist Realty Co.* v. *Commissioner,* 102 F. (2d) 945, which discusses the *McEachern* case, yet the Court had no difficulty in applying the equitable rule of *Stone* v. *White.* In the *Lofquist* case the corporation made an installment sale of a leasehold in 1929. In the same year it assigned the sales contract to its sole stockholder, but did not mention the assignment on its tax return. In its 1930, 1931 and 1932 tax returns it represented the installment payments as its own income. After it was too late to collect the proper tax from the sole stockholder for 1929 the Corporation sought a refund of the 1932 tax on the ground that the sole stockholder owned the sales contract. The Seventh Circuit held that

the Corporation was estopped to set up the true facts in its action to recover 1932 taxes. That, in effect, permitted recoupment of the barred claim by the government to the extent of the refund sought.

IV.

Whether or not broad equitable principles are to apply both for and against the government in tax cases is a matter of great public importance. If the rule of the case at bar is law and equitable considerations have no bearing in the decision of tax cases, it means that, in situations such as in the Lofquist case, future decisions must be directly opposite to that in the *Lofquist* case, with the resulting adverse effect upon the revenue. See *Grand Central Public Market* v. *United States*, 22 F. Supp. 119 (S. D. Calif.), where the government unsuccessfully attempted to offset barred additional income taxes for 1925, 1926, 1927 and 1928 against an admitted overpayment of similar tax for 1929, under circumstances similar to those in the *McEachern* case. On the other hand in *West Virginia Pulp & Paper Co.* v. *McElligott* (S. D. N. Y.), 40 F. Supp. 765, recoupment was permitted in favor of the government and the *McEachern* case held not to apply.

In addition the proper application of the *Bull, Stone* v. *White* and *McEachern* cases has resulted in much litigation.

According to the Prentice-Hall Federal Tax Citator Service the *Bull* case has been cited approximately 91 times; *Stone* v. *White* 62 times, and *McEachern* v. *Rose* 32 times up to February 21, 1942. It would seem that if this vexing question is settled by this Court, much litigation may be avoided. Illustrative are the *Grand Central Public Market* and *West Virginia Pulp & Paper Co.* cases previously cited, *Henry E. Mills* v. *United States* (N. D. N. Y.) 35

F. Supp. 738, and the Court of Claims case of *Dunigan* v. *United States*, 87 Ct. Cls. 404, 23 F. Supp. 467.

Conclusion.

For the reasons stated the petition should be granted.

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Of Counsel:
MITCHELL & VAN WINKLE,
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February, 1942.

APPENDIX.

Statutes and Regulations Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Credits and Refunds

Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 607. Effect of expiration of period of limitation against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

Sec. 608. Effect of expiration of period of limitation against taxpayer.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

Sec. 609. Erroneous credits.

(a) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) Credit of barred overpayment.—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 503. Statute of limitations on suits for refund.

Section 608 (b) (2) of the Revenue Act of 1928 is amended by adding at the end thereof a new sentence to read as follows:

"If such agreement has been entered into, the running of such statute of limitations shall be suspended in accordance with the terms of the agreement." (U. S. C., Title 26, Sec. 1674.)

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 990

JOSEPHINE V. HALL, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The decision below is in accord with *McEachern* v. *Rose,* 302 U. S. 56. This Court there held that the equitable considerations which governed in *Stone* v. *White,* 301 U. S. 532, were inapplicable because of certain statutory provisions (Sections 607 and 609 of the Revenue Act of 1928). Like statutory provisions are present here (Sections 608 and 609 of the Revenue Act of 1928), and similarly bring into play the rule of the *McEachern* case.

We think that the statutory provisions relied upon in the *McEachern* case were not intended to

render the rule of *Stone* v. *White* inapplicable, and that the decision in the *McEachern* case is erroneous. The *McEachern* case, however, supports the decision below in this case, and unless this Court is willing to reexamine the *McEachern* case certiorari should be denied here. Since we think that the *McEachern* case is erroneous we would welcome a reexamination and do not oppose certiorari if the writ were granted for that purpose. But unless the Court were disposed to reexamine the *McEachern* case there would be no occasion for certiorari, since that decision is a complete bar to petitioner's claim.[1]

The two circuit court of appeals decisions relied upon by petitioner (*Lofquist Realty Co.* v. *Commissioner,* 102 F. (2d) 945 (C. C. A. 7th); *Dixie Margarine Co.* v. *Commissioner,* 115 F. (2d) 445 (C. C. A. 6th)) do not present an adequate basis for certiorari. The *Lofquist* decision is distinguishable, since it was expressly based upon an estoppel, 102 F. (2d) at 948; and although the question was implicit in the *Dixie Margarine* case, the rule of the *McEachern* case was not considered by the court nor was the decision even cited by the

[1] It may be, however, that even if the *McEachern* case were overruled, petitioner would still not be entitled to prevail here, either by reason of the express provisions of the revenue acts defining adjusted basis for determining gain or loss upon sale, or by reason of the particular facts of this case.

Government prior to the Government's petition for rehearing in the Circuit Court of Appeals. In these circumstances, it cannot be said that there is a true conflict between the decision below and the decisions in those two cases.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 990

JOSEPHINE V. HALL, *Petitioner,*

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

Comes now the above-named petitioner, by her attorney, and petitions for a rehearing of the petition for a writ of certiorari herein. The said petition for certiorari was denied April 6, 1942.

QUESTION PRESENTED.

The taxpayer was a beneficiary under a trust. From 1913 until 1928 the Commissioner of Internal Revenue failed and refused to allow either the beneficiaries, or the trustees, deductions for depreciation of improvements, or amortization of the leaseholds comprising the corpus of the trust. Upon the sale of the leaseholds in 1932, and the termination of the

trust, the Commissioner in computing gain reduced the basis of the leaseholds by deductions for depreciation and amortization for years prior to 1929, which he had failed and refused to allow in computing income for those years.

Is the taxpayer entitled to a refund of taxes paid on the proceeds of the sale by way of recoupment on account of taxes admittedly overpaid for prior years? The petitioner contends she should recover on the authority of *Bull* v. *United States*, 295 U. S. 247, and *Stone* v. *White*, 301 U. S. 532. The Court of Claims held that recoupment did not apply, relying upon *McEachern* v. *Rose*, 302 U. S. 56.

REASONS WHY THIS PETITION FOR REHEARING SHOULD BE GRANTED.

I.

This Court Has Recently Granted Certiorari in a Recoupment Case.

This Court has recently granted certiorari and decided No. 325, *Rodiek* v. *United States*,[1] which involved recoupment and alleged conflict with *Bull* v. *United States*, 295 U. S. 247, and *Stone* v. *White*, 301 U. S. 532.[2] The case at bar is in conflict with the *Bull* and *Stone* v. *White* cases.

If certiorari were granted in the *Rodiek* case because of the conflict with *Bull* v. *United States* and *Stone* v. *White*, justice demands that certiorari be granted in this case. Surely the Court will not hear one litigant on a question and, at the same time, refuse to hear another litigant on the same question. This is particularly true where the case heard was disposed of by an equally divided Court, with three Justices not participating.

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[1] Affirmed, *Per Curiam*, March 2, 1942, by an equally divided Court, with the Chief Justice, Mr. Justice Murphy and Mr. Justice Jackson not participating.

[2] Page 20, Petition for Certiorari and page 18, Brief for Respondent in Opposition, No. 325, October Term, 1941.

II.

There is an Admitted Conflict With a Decision of the Sixth Circuit.

The "Memorandum for the United States" in the case at bar admits that the decision below is in conflict with the decision of the Sixth Circuit in *Dixie Margarine Co.* v. *Commissioner*, 115 F. (2d) 445, stating:

> "* * * although the question was explicit in the *Dixie Margarine* case, the rule of the *McEachern* case was not considered by the Court nor was the decision even cited by the Government prior to the Government's petition for rehearing in the Circuit Court of Appeals."

Obviously, the Sixth Circuit must have studied all relevant decisions before deciding the *Dixie Margarine* case. If it had originally overlooked the *McEachern* decision, and the point involved therein, it was under a duty to grant the petition for rehearing when the case was called to its attention. Consequently, it must be assumed that the Sixth Circuit considered the *McEachern* decision, because it is unthinkable that a Circuit Court of Appeals would be derelict in its duty, and decide a case without reference to applicable precedents.

III.

The Question is One of Importance in the Administration of the Revenue Laws and is in a State of Confusion.

The problems presented in this case are varied, vital and recurring. They affect the United States as much as they do taxpayers.

The confusion is well illustrated by Judge Clark's dissenting opinion in *Lyeth* v. *Hoey*, 112 F. (2d) 4, (C. C. A. 2) wherein the Government took the position which the taxpayer takes in the case at bar. Judge Clark states, page 8:

> "The interesting, if difficult, problem here presented requires us first to interpret and reconcile Supreme

> Court decisions which the Court itself does not regard as conflicting."

At page 9, Judge Clark continues:

> "To date the principles of such recoupment have been only partially developed by the Supreme Court. It seems, therefore, that those are problems for the Courts."

Because of the uncertainty of the law, the United States has taken inconsistent positions. Thus we find the decisions: (1) that equitable considerations cannot override statutory provisions, as in the case at bar; (2) that limitation statutes do not apply when estoppel is present, as in *Lofquist Realty Co.* v. *Commissioner,* 102 F. (2d) 945 (C. C. A. 7); (3) where there is something akin to estoppel, actually a duty of consistency, it is controlling, as in *Alamo National Bank* v. *Commissioner,* 95 F. (2d) 622 (C. C. A. 5). Cf. *Stearns Co.* v. *United States,* 291 U. S. 51, 61-62, to the effect that, irrespective of a limitation in a taxing statute, "no one shall be permitted to found any claim upon his own inequity, or take advantage of his own wrong".

The multiplicity of suits resulting from the confusion surrounding this question is discussed at page 8 of the Petition for Certiorari in the case at bar.

IV.

Both Parties Desire Certiorari.

In the case at bar the United States and the petitioner agree that the *McEachern* case, relied upon by the Court of Claims as authority for its decision, is erroneous.

The "Memorandum for the United States" in the case at bar states:

> "We think that the statutory provisions relied upon in the *McEachern* case were not intended to render the rule of *Stone* v. *White* inapplicable, and that the decision in the *McEachern* case is erroneous. • • • Since we think that the *McEachern* case is erroneous, *we*

would welcome a re-examination and do not oppose certiorari if the writ were granted for that purpose." (Italics supplied)

Respectfully submitted,

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April 30, 1942.

CERTIFICATE OF COUNSEL

ROBERT ASH, counsel for the above-named petitioner, does hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

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Attorney for Petitioner.